TESTIMONY OF SAM KAZMAN, COMPETITIVE ENTERPRISE INSTITUTE, BEFORE THE HOUSE COMMITTEE ON COMMERCE, SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION REGARDING REAUTHORIZATION OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

SUMMARY

NHTSA's handling of both its CAFE program and its air bag mandate illustrate that the agency is incapable of honestly assessing its failures. In the case of CAFE, NHTSA has refused to honestly assess the impact of CAFE-induced downsizing on passenger car safety. Its treatment of this issue required it to contradict a host of its own findings, and earned it an incredibly harsh reprimand from one federal appeals court. Nonetheless, the agency has continued to absolve CAFE of any adverse safety effect.

In the case of air bags, NHTSA has refused to acknowledge its failure to adequately test these devices in the real world, and it has refused to admit that air bag operates at only one-third the effectiveness that the agency itself promised. Instead, the agency is now considering whether to mandate an even more complex version of the device.

Both of the episodes illustrate not only the dangers of technology-forcing mandates, but the perils that arise when a safety agency focuses not on assessing its mistakes, but on avoiding their consequences.

INTRODUCTION

On behalf of the Competitive Enterprise Institute, I wish to thank this Subcommittee for this opportunity to testify. CEI is a nonprofit organization dedicated to advancing private solutions to regulatory issues, in areas ranging from environmental protection to health and safety. CEI also has a special interest in raising public awareness of the hidden costs, human as well as monetary, of overregulation. Most importantly, in terms of this hearing, CEI has extensive experience with two major programs conducted by NHTSA--the air bag mandate and CAFE, the Corporate Average Fuel Economy Standards.

I
BECAUSE NHTSA REFUSES TO CONFRONT ITS MISTAKES IN SUCH PROGRAMS AS CAFE AND THE AIR BAG MANDATE, IT WILL INEVITABLY REPEAT THOSE MISTAKES ON AN EVER GROWING SCALE

The major point of our testimony involves NHTSA's inability either to admit or to learn from its mistakes. This is not an abstract, pedantic point; to the contrary, it is an issue of life-and-death proportions.

In the private world, a company that produces defective products has to pay for its mistakes. It will be subject to court-imposed liability judgments and to market-imposed declines in its stock valuation as both its balance sheet and its reputation suffer. The likelihood of paying for one's mistakes creates a strong incentive to avoid those mistakes in the first place, and to learn from those mistakes that do occur.

As a government agency, however, NHTSA stands in a far different position. If it produces a defective policy, it will never have to pay damages in a court action; the doctrine of sovereign immunity bars this sort of penalty. Nor is NHTSA subject to any sort of market-imposed discipline; its power is political. In short, two of the basic factors which induce private companies to act responsibly are absent when it comes to NHTSA.

There is a third factor which can have some impact on NHTSA--that of public opinion, which can have obvious though indirect repercussions through the political system. Congressional hearings such as this are one potential example. But when it comes to public opinion, NHTSA has proved to a master of the game in the worst sense. In the case of both air bags and CAFE, NHTSA has refused to honestly confront its mistakes. If either CAFE or the air bag mandate were privately produced products, they would have been recalled long ago. But because they are products of the political process, they remain in effect; in fact, they even threaten to grow in size and impact.

II

DESPITE THE FACT THAT IT HAS BEEN ADMINISTERING CAFE FOR TWO DECADES, NHTSA HAS NEVER FACED UP TO THAT PROGRAM'S LETHAL CONSEQUENCES

The connection between vehicle size or mass and crash-worthiness is one of the most well established relationships in traffic safety. Countless studies demonstrate that larger cars are generally safer than smaller cars in every crash mode--

single-car impacts, multiple car collisions, rollovers, etc. As NHTSA has noted,

> "The increased risks for small car occupants who are in collisions with larger cars are easily recognized. But, it is also true that even in single vehicle crashes, there is increased risk of serious injury or death." NHTSA, Small Car Safety In The 1980's at 59 (1980).

The reasons for this are the reduced "survival space" of the occupant in a small car, and the reduced physical structure available to "absorb and manage crash energy and forces" in such a car. Id. at 64.

Downsizing, however, has also been a major means by which to increase fuel economy. In the agency's words, the "most obvious method for improving fuel economy is to make the passenger automobile lighter." NHTSA, Final Rule, 42 FR 33,534, 33,537/3 (i.e., column 3 on page 33,537) (1977).

There is thus a conflict between vehicle safety and CAFE, and it is a conflict which NHTSA recognized in theory long ago:

> "With these smaller and lighter vehicles joining an increasing number of heavy trucks and older, heavier cars already on the road, the risk of death and serious injury will increase markedly." NHTSA, Traffic Safety Trends and Forecasts 2 (1981).

Over time, the lethal effects of CAFE were actually calculated with some precision. A 1989 Harvard-Brookings study estimated that the 27.5 mpg CAFE standard for passenger cars was responsible for a 500-lb. drop in the average weight of a new car, and that this translated into a 14-27 percent increase in occupant fatalities--2,200 to 3,900 additional traffic deaths per

year. R.W. Crandall & J.D. Graham, The Effect of Fuel Economy Standards on Automobile Safety, 32 J. Law & Econ. 97, 109-16 (1989).

In its passenger car CAFE rulemakings, however, NHTSA steadfastly refused to admit that any particular CAFE standard had even the slightest effect on safety. Even when NHTSA rolled back its CAFE standards for MY (model years) 1986-89, and pointed out the various beneficial effects of these rollbacks on the economy and on consumer choice, it refused to admit that traffic safety would benefit as well:

> "While the agency recognizes the relationship between safety and vehicle size and weight, in a crash, it nonetheless concludes that CAFE standards in the range of 26.0 mpg to 27.5 mpg need not have a significant effect on safety." 51 FR 35,612/3 (1986).

In support of these claims, NHTSA resorted to a host of incredible contentions. For example, it denied that CAFE had any effect on car size, even though its own reports to Congress touted that CAFE was forcing carmakers to use lighter materials. Similarly, it argued that its crash tests demonstrated that both large and small cars could perform equally well. Yet at the same time NHTSA's own crash test reports carried the following boldface warning:

> **"Large cars usually offer more protection in a crash than small cars.** These test results are only useful for comparing the performance of cars in the **same size class.**" NHTSA, Testing How Well New Cars Perform In Crashes (undated; approx. 1985).

In short, NHTSA's claims were based

on a host of contradictions. In 1992, a federal appeals court agreed with this assessment. Ruling in a challenge filed by CEI and Consumer Alert against NHTSA's MY 1990 standard, the court overturned the agency's claim of no safety effect with some incredibly harsh characterizations. CEI and Consumer Alert v. NHTSA, 956 F.2d 321 (D.C.

Cir. 1992) (Attachment A hereto). It ruled that NHTSA's decision was an "attempt to paper over the need to make a call. We cannot defer to mere decisional evasion." 956 F.2d at 323. It noted that NHTSA had

> "fudged the analysis ... and, with the help of statistical legerdemain, made conclusory assertions that its decision had no safety cost at all. ... The people petitioners represent, consumers who do not want to be priced out of the market for larger, safer cars, deserve better from their government." Id. at 324.

The court characterized NHTSA's attempt to dismiss the importance of downsizing in CAFE compliance as a "lame claim", and characterized its argument about the availability of large foreign cars as being "in the spirit of Marie Antoinette's suggestion to 'let them eat cake'." Id. at 325 & n.1. It concluded with these words:

> "When the government regulates in a way that prices many of its citizens out of access to large-car safety, it owes them reasonable candor. If it provides that, the affected citizens at least know that the government has faced up to the meaning of its choice. The requirement of reasoned decisionmaking ensures this result and prevents officials from cowering behind bureaucratic mumbo-jumbo." Id. at 327.

Because NHTSA had so utterly failed to face up to the CAFE-safety issue, its decision was remanded. This was the first time that a CAFE standard had failed to satisfy judicial review.

In the face of this decision, NHTSA did not reform its ways. Instead, it took over a year to come up a with new rationale for its same claim--that CAFE did not have any safety effect at all. Among its arguments, this time around, was the contention that CAFE had no effect on car size. After all, it claimed, "the size and weight of many other products, ranging from SLR cameras to computers, was reduced during the same period ...." 58 FR 6946/1 (1993).

NHTSA was thus claiming, in all seriousness, that size trends for objects that consumers carried around their necks or placed on their desks were somehow indicative of what might happen to cars absent CAFE! (At the same time, of course, such non-portable objects as large-screen televisions and new homes were increasing in size; in NHTSA's desperation to justify CAFE, however, this was irrelevant.)

CEI and Consumer Alert challenged this decision as well. We did not succeed; a new panel of judges upheld NHTSA's decision, noting the high degree of deference to which agency rulemaking is

entitled. CEI and Consumer Alert v. NHTSA, 45 F.3d 481 (D.C. Cir. 1995). Nonetheless, the court still pointed out that, on the CAFE-safety issue, the agency's approach left much to desired--"NHTSA's failure to adequately respond to the Crandall and Graham study is troubling ...." Id. at 486.

In short, an agency whose middle name is safety has been administering a program which in all likelihood kills people. It has refused to admit this. Two separate appellate courts have noted the unsatisfactory nature of the agency's approach, and one of these courts found it so inadequate as to be illegal. CAFE, however, continues to remain in force, and NHTSA continues to maintain that its year-to-year standard has no calculable effect on passenger car safety.

III
NHTSA'S APPROACH TO THE AIR BAG ISSUE DEMONSTRATES ITS INABILITY TO LEARN FROM ITS PAST MISTAKES

While CAFE is a program whose lethal effects have been concealed by NHTSA, the air bag mandate is a program whose safety benefits were, in retrospect, vastly overblown by the agency. Yet to this day, NHTSA has steadfastly refused to admit this; instead, its position is that the air bag mandate is performing as expected, with the exception of unanticipated risks to children and certain other groups such as small-statured women and the elderly--risks that the agency itself supposedly correcting.

The air bag mandate is deservedly controversial. Its imposition of deadly risks on infants, children, and small women,

and of serious non-lethal risks on such groups as the hearing impaired, raises major ethical questions. In the words of one noted philosopher, the mandate's "women and children last" approach

> "contravenes broadly shared moral principles that address the acceptability of forced tradeoffs across persons and that govern the relationship between a liberal government and its citizens." L. Lomasky, Sudden Impact: The Collision Between The Air Bag Mandate And Ethics at 3 (CEI, 1997) (Attachment B hereto).

According to a recent CEI poll, Americans favor repeal of the mandate by a ratio of nearly three to one. The Polling Company, A National Poll: Should The Federal Government Continue To Mandate Air Bags? (CEI, April 1997) (Attachment C hereto). As of this date, however, NHTSA has not even decided whether to allow Americans to deactivate these mandated devices.

Regardless of where one stands on such issues as deactivation and depowerment, however, it is the history of the air bag mandate that raises basic questions about NHTSA as an institution.

When the original passive restraint mandate was issued in 1977, I was counsel of record in an unsuccessful court challenge to that mandate--Pacific Legal Foundation v. DOT, 593 F.2d 1338 (D.C. Cir. 1978). We challenged the mandate on two grounds: 1) the real-world testing of air bags was inadequate; 2) NHTSA had no basis for imposing the risks of air bags on the public.

The court ruled against us on all of these grounds. In retrospect, however, it is clear that, if NHTSA had paid

attention to these widely raised concerns at the outset, it might well have avoided the tragedies we are now experiencing.

To begin with, NHTSA's position in 1977 was that it knew all that it needed to know about air bags. An agency brochure dismissed "critics [who] contend that not enough is known about these systems, that they are untried and unproven." NHTSA, Automobile Passive Restraint Systems and What They Mean To You at 6 (1977). The agency itself attacked the notion that it needed "statistically significant real world data [to] confirm its estimates of effectiveness." 42 FR 34,292 (1977).

It is evident now that the real world data that NHTSA decried in 1977 could have given the agency, and the public, some badly needed knowledge about air bag operation--knowledge that we are only now accumulating under an across-the-board federal requirement.

Yet NHTSA is on the verge of repeating this mistake. The agency should have known in 1977, and it should certainly know by now, that no matter how promising a new technology may look on paper, it must still be extensively tested under real-world conditions. NHTSA, however, is now proposing to require "smart" air bags, once again with little if any real-world testing. Having given us one ill-fated air bag mandate, the agency now proposes to subject us to still another. Once again, it will be the public that pays for NHTSA's mistakes, not the agency.

Moreover, NHTSA has still failed to confront the exaggerated nature of its 1977 claims for air bags. NHTSA claimed at the

time that the air bag alone would reduce fatalities in all crash modes combined by 40 percent, and in frontal collisions by 65 percent. NHTSA, Standard 208--Explanation of Rule Making Action, "Effectiveness" section at p.8 (July 26, 1977). According to the agency's current figures, however, actual air bag effectiveness for unbelted occupants is only 13 percent overall and only 34 percent in frontal collisions. NHTSA, Fatality Reduction by Air Bags ix (Aug. 1996). (Since the statistics for unbelted occupants exclude the effect of seat belts, they are the best comparison to NHTSA's 1997 claims for air bags alone.)

In short, the air bag is operating at only one-third the level that NHTSA predicted in 1977. The agency, however, continues to insist that, with certain deadly exceptions, air bags are working as expected.

NHTSA's refusal to admit this incredible shortfall is mirrored by the current actions of former Administrator Joan Claybrook, who headed the agency when the passive restraint mandate was issued. She portrays herself on national news as having "warned" the public of the risks of air bags; her warnings, she says, were overridden by the auto industry's sales push for the device. CBS Evening News, Nov. 7, 1996. In fact, it was Ms. Claybrook who was responsible for this sales push, and her public statements contained practically nothing about the air bag's risks. In a Nov. 21, 1983, debate with me on CNN, for example, she declared that air bags

"fit all different sizes and types of people, from

> little children up to 95th percentile males, very large males. So they really work beautifully and they work automatically and I think that that gives you more freedom and liberty than being ... forced to wear a seatbelt ...." Transcript in Attachment D.

(Other examples of Ms. Claybrook's current contentions, and of their contradiction by the public record, are set forth in Attachment D: S. Kazman, "Naderites' Nadir", Wall St. Journal (WSJ), Dec. 3, 1996 (op-ed page); J. Claybrook, Letter, WSJ, Jan. 2, 1997; S. Kazman, Letter, WSJ, Jan. 17, 1997; S. Kazman, "NHTSA Air Bag Mandate Misfires", Regulation (Winter, 1997) 17.)

Rather than attempt to assess its failings in the air bag mandate, NHTSA has focused its energies on controlling public reaction. A 1991 NHTSA memorandum discusses the agency's concern that "bad press [on air bag deaths] could cause a lot of harm to the public's positive perception". See Regulation article in Attachment D. In its 1993 rulemaking on the air bag warnings required on vehicle sun visors, NHTSA adopted watered-down language, in part at the urging of consumer "safety" groups, among them one co-chaired by Ms. Claybrook. Id.

The air bag mandate demonstrates that, rather than honestly assess its performance, NHTSA's prime objective has been spin control. It also demonstrates that the agency has refused to learn from its errors, and is once engaged on a course that will in all likelihood repeat those errors.

CONCLUSION

There is a saying that those who are ignorant of history are doomed to repeat it. NHTSA is not ignorant of its history, but

as a political entity, immune from liability and only indirectly accountable to the public, NHTSA seems doomed to repeat its errors, over and over again. As in the past, the public will pay the toll, and that toll will be very costly, both in monetary terms and in human ones.

One of the few things that can prevent this from happening is effective congressional oversight. Such oversight is in the hands of this subcommittee.

DISCLOSURE OF FEDERAL GRANTS AND CONTRACTS

The undersigned hereby certifies that neither he nor CEI has received any federal grant or contract, or subgrant or subcontract, during the current fiscal year or either of the two preceding fiscal years.

Respectfully submitted,

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